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# In the

# Supreme Court of the United States

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**WINN-DIXIE STORES, INC. and**
**WINN-DIXIE LOUISVILLE, INC.,**

*Petitioners,*

*versus*

**NATIONAL LABOR RELATIONS BOARD,**

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners, Winn-Dixie Stores, Inc. and Winn-Dixie Louisville, Inc., by and through their undersigned counsel, petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered in this case on February 27, 1965.

### OPINIONS BELOW

The decision of the Court of Appeals (Vol. II, Certified Record herein) is reported at 341 F. 2d 750 (6th Cir. 1965),

58 LRRM 2475, and 51 LC ¶19,528; the decision and order of the National Labor Relations Board (Vol. I, p. 2a, Certified Record herein), which was enforced by the said decision and judgment of the Court of Appeals, are reported at 143 N.L.R.B. 848, 1963 CCH N.L.R.B. ¶12,491, and 53 LRRM 1416.

## JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1965 (Vol. II, Certified Record). Petitioners, Winn-Dixie Stores, Inc. and Winn-Dixie Louisville, Inc., (Respondents below), filed a petition for rehearing in the Court of Appeals on March 19, 1965, which was denied on March 31, 1965 (See Vol. II, Certified Record). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

## QUESTIONS PRESENTED

1. Whether the decision by the Sixth Circuit Court of Appeals herein is in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *National Labor Relations Board v. Peterson Bros., Inc., including its division, Diversified Products Company*, 342 F. 2d 221 (5th Cir. 1965), 51 LC ¶19,564, 58 LRRM 2570 (hereinafter referred to as the *Peterson Bros.* case).

2. Whether the Court of Appeals "grossly misapplied" the standard of review set forth in *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474, 71 S. Ct. 456 (1950), by affirming the Board's findings that many ambiguous union authorization cards should be counted in determining the union's majority status, despite many gross misrepresentations and false promises to the card signers at the time of soliciting their signatures to the effect that there definitely would be an election.

## STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C. 151, *et. seq.*) are as follows:

"Sec. 8. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees . . . [29 U.S.C.A. § 158(a)(5)]", and

"Sec. 10. Prevention of Unfair Labor Practices

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be

conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28." [29 U.S.C.A. § 160 (e).]

## STATEMENT OF THE CASE

### I. Jurisdiction of the lower court

The jurisdiction of the Court of Appeals for the Sixth Circuit was based on Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, U.S.C. 151, *et. seq.*) (hereinafter called the Act).

### II. Introductory comment

This case arose on a charge by the union[1] that the Company[2] had refused to bargain and had committed certain unlawful threats and interrogations during the union's or-

[1] District Union Local 227, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

[2] Winn-Dixie Stores, Inc. and Winn-Dixie Louisville, Inc.

ganizational campaign in late 1962 at the Company's Winn-Dixie store in Owensboro, Kentucky.

During this organizational campaign, the union solicited signatures on their ambiguous authorization cards, which read as follows:

> **"Authorization for Representation Under The National Labor Relations Act**
>
> _____ 196____
> Date
>
> I, the undersigned, employee of _____
> Name of Company
>
> Employed as (job title) _____
>
> Hereby authorize District Union Local 227, AFL-CIO, to represent me *and in my behalf petition the National Labor Relations Board for an election to determine Bargaining Rights.*
>
> _____
> Signature of Employee
>
> _____
> Home Address "

(Emphasis ours)[3]

In a unit found to be appropriate of twenty-three employees, the union had obtained the signatures of sixteen employees on their authorization cards. Two of these cards were discredited immediately because *signed by persons who were admittedly supervisors, Everly and Westerfield*. Of the remaining fourteen employees whose cards were submitted to the Company with the bargaining demand of August 15, 1962, twelve appeared to testify to explain the circumstances of their signing. Two employees who signed cards, Larry Elder and Naomi Gray, did not testify; instead, the union solicitors who procured their signatures—Wesley

[3] Hereafter all emphases are ours unless otherwise indicated in parentheses immediately following the quoted matter (except possibly names of cases, all of which will be italicized herein).

Posey and Russell Matthews, respectively—testified as to the circumstances of their solicitation and execution. The Trial Examiner, the National Labor Relations Board, and the Court of Appeals for the Sixth Circuit, found that thirteen of the fourteen employees' cards were reliable as designations of the union as their bargaining representative. One card, that of Larry Elder, was discounted on the grounds that he was admittedly told by the solicitor, Wesley Posey, that the purpose of the card was *"merely to show enough interest to have an election out there."* (T.122; R.A. lb)[4]

### III. The facts

In order to show the conflict in the decisions between the instant case and the *Peterson Bros.* case, (page 2, *supra*), it is necessary to relate the pertinent facts in both cases.

The cards used by the union solicitors in the two cases are identically ambiguous in that they both authorize the union to represent the employee *and/or petition for an election.*

The *Winn-Dixie* card reads:

"I . . . Hereby authorize District Union Local 227, AFL-CIO, to represent me *and* in my behalf *petition* the National Labor Relations Board *for an election* to determine Bargaining Rights." (B.A. 19a; 341 F.2d at 754).

The *Peterson Bros.* card, entitled "Authorization for Representation", reads:

"I . . . hereby select the above named Union as my collective bargaining agent. . . . *This is not an application for membership.* It is for use in support of the demand by this Union for recognition from the Company on your behalf, *or for an NLRB election.*"

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[4] "T." refers to the transcript of the testimony in the case; "R.A." refers to the Respondent's Appendix in the Court below, which is included in Volume II of the Certified Record herein; "B.A." refers to the Board's Appendix in the Court below, which is Volume I of the Certified Record herein.

**A. JAMES E. THOMPSON, JR., a Winn-Dixie employee, testified:**

"Q. Who gave you the card? A. My uncle, James Wright.

* * *

Q. Was that the first time anyone had brought a card to you?

A. No, sir; there was one other man who approached me on the parking lot of Winn-Dixie with Jimmy Strobel.

Q. What did Strobel tell you? A. They asked me to sit down in their car and he told me he was the representative from the union and that they were trying to get a union into Winn-Dixie and he said he would like to talk to me about whether I would want a Union at Winn-Dixie or not *and he showed me a card and said, 'This card is a petition to get an election in Winn-Dixie to decide whether we want a Union or not,' and he said we would have secret ballots and that we could either vote yes or no, whichever way we wanted,* and at that time I talked to him for awhile and told him I didn't want to sign a card because my father had asked me not to sign a Union card unless I talked to him . . ." (T. 168-9; B.A. 92-93a).

"So the next morning when they came to my house— Q. Who came? A. The man who had approached me before. I told him he could come to my house and I would tell him yes or no, and he came to my house and I told him what my father had said [no] and he said, 'Okay,' and he left and, oh, maybe a week or so later then my Uncle James Wright came to me and he told me that Jerry Everly said myself, Roy Lee and James Wright were going to be fired because we were all making too much money and so he asked me to sign a Union card." (T. 170; B.A. 93a)

* * *

"Q. Were you under the impression at that time [when he signed a card] that there would be an election *even though you signed the card?* A. *Yes, sir; I had been told there would be an election.*" (T. 171; R.A. 3b)

"Trial Examiner: You read the card? The Witness: Yes. Trial Examiner: You understood what it said? The Witness: *I understood that the card said that they would rep-*

*resent me in a petition to the Government for an election for the Union.*" (T. 172-173; R.A. 4b)

* * *

"Q. *Did you want a Union to represent you?* A. *No, sir, I didn't.*" (T. 171; R.A. 3b)

The above is the uncontradicted, corroborated testimony of James E. Thompson, Jr., a teen-age bag boy at Winn-Dixie's Owensboro store. *His card was counted* by the Trial Examiner, the Board, (National Labor Relations Board) and the Court of Appeals for the Sixth Circuit as a valid designation of the union *as his bargaining representative, despite the fact that no election was ever held, and notwithstanding all of the above-quoted uncontradicted, corroborated testimony.*

**B. WILLIAM FRANKLIN CROSS (Peterson Bros.)**

"We talked about the card and *he* [Union organizer Davenport] *told* me that he would have an election here and that it was for to find out if the majority of the men wanted a Union; and that later on we would have a vote down there—you know—and that it would be at the Company or some place agreed by the — by both people.*** The election—hold the election down there and find out if the majority of the men—sign the card and find out if they could get a percentage of the men where it could go in there *and have an election.*" (T. 490; P.B.A. 122)[5]

And further:

"No, I signed a card with the clear knowledge there would be an election later." (T. 494; P.B.A. 124).

Based on the above uncontradicted testimony in the *Peterson Bros.* case, the Fifth Circuit Court of Appeals reversed

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[5] To distinguish between the references to the Board's Appendix in the *Peterson Bros.* case (which is not in this record) and the Board's Appendix in the instant case, the initial's "P.B.A." will be used in references to the *Peterson Bros.* case, whereas just "B.A." will be used in reference to the instant case.

the Board and held that Cross' card was not a valid designation of the union as his bargaining representative.[6]

**C. JOSEPH C. HAGAN (Winn-Dixie)**

> "Q. Was it your understanding that the card signing was *just a step toward an election?* A. *Yes, sir,* the same as this trial was." (T. 412-413; R.A. 5b).

And further:

> "A. Well, they asked me that if *at the time I signed* that was I advised that there would be an election *and I was . . .*" (T. 412; R.A. 5b).

Despite the above testimony in the *Winn-Dixie* case, and despite the fact that no election was ever held, Hagan's card was counted as a valid designation of the union *as his bargaining representative.*

**D. HOYT MATTHEWS, JR. (Peterson Bros.)**

> "Well, by signing, *I knew that was the first step, but I knew there was another—I had another step.*" (T. 469; P.B.A. 111).

Matthew's above testimony in the *Peterson Bros.* case caused the Fifth Circuit Court to *reverse* the Board's holding that his card was a valid designation of the union as his bargaining agent. (*Ibid.*) This is directly contrary to the holding by the Sixth Circuit Court in the *Winn-Dixie* case as to Hagan's card.

Respondent reminds the Court that if the above two Winn-Dixie cards of Thompson and Hagan were *erroneously* counted by the Sixth Circuit Court, then that concludes

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[6] The Court said, "If the union also wished to have cards signed to call an election this would also be a very simple matter. There can be little excuse for combining the two in a card that makes possible the misrepresentation that the Board found to have existed in the case of McElveen and the misunderstanding that the examiner found as to three other employees *and which we now find as to four employees.*" 342 F. 2d at 225.

any question of refusal to bargain, since that Court held that the Union achieved its majority by only two votes, 13 out of 23.

**E. NAOMI GRAY (Winn-Dixie)**

Russell Matthews, *a card solicitor for the union, admitted*, regarding his solicitation of Naomi Gray, who did not testify, that he told her of union benefits and that there would be an election, saying:

"Q. Do you recall any of the discussion at the time about an election? A. *We told her that there would be an election, yes sir.*

Q. And was it explained to her at that time that she would have the opportunity to vote in secret? A. *Yes, sir, we said it would all be secret.*

Q. *Is that what you told all the people that you contacted?* A. *Yes, sir.*" (T. 136; B.A. 84a)

And later:

"Q. Did you talk to other people other than Mrs. Gray? A. *Yes, sir.*

Q. Did you tell all of them the same thing that you told Mrs. Gray? A. Yes, sir.

Q. And who else did you see?

Mr. Liebman: I will object to this as being outside the scope of direct. I can't see any point in this . . .
[After some discussion . . .]

Trial Examiner: I will sustain the objection to that." (T. 140-141; B. A. 87a) He did not say that he told her that the purpose of the card was to have the Union represent her.

**F. CLARENCE RHODES (Peterson Bros.)**

Rhodes testified that Page Groton, a union organizer, came to his home to get Rhodes to sign a union card. Rhodes said he was told by Groton (who did not testify) that the union

was attempting to represent the employees. (No one testified that Naomi Gray was told this, in the *Winn-Dixie* case.) Rhodes told Groton that because he had worked for Peterson for about six years and had never been laid off, Rhodes did not feel it was right for him to sign a card. Groton then said, according to Rhodes, "The only thing I'm asking you to do is sign the card; regardless of how you vote—I would like for you to sign the card so that we could have the election." (144 N.L.R.B. at 689; T. 473-4; P.B.A. 114-115).

On the basis of this testimony, the Trial Examiner, Member Leedom, and the Fifth Circuit Court of Appeals rightly rejected Rhodes' card.

Notice that Rhodes was told that the union was attempting to represent him *and* he was also definitely led to believe that there would be an election. Compare this with the admission by one of the card solicitors in the *Winn-Dixie* case, Wesley Lee Posey, that he told five or six employees, (whose cards were counted) that there would be an election, and that he was told by his union superiors to tell all the people he contacted that, and that is what he did tell them.

### G. WESLEY LEE POSEY (Winn-Dixie)

Wesley Lee Posey, an employee of A & P and one of the union card solicitors, admitted misrepresenting to the employees whom he contacted that the purpose of the card was *merely to show enough interest to have an election.* He testified accordingly:

"Q. *Did you tell him* [Elder] *that the purpose of the card was merely to show enough interest to have an election out there?* A. *Yes.*

Q. In other words, Mr. Elder then signed this card with the understanding that it would be a secret election? A. That it would be an election, yes.

Q. And did you tell him that? A. Yes.

Q. Did you tell him at that time that he would have the opportunity to vote secretly? A. I told him he would have the opportunity to vote yes or no.

Q. I see, and did you believe that? A. Yes.

Q. And it is still your understanding there will be an election? A. Not now.

Q. Not now? Why would you tell him there would be then if you don't— A. Well, at that time I—

Mr. Isenberg: I think he's calling for a legal conclusion from a person who is not an attorney.

Mr. Bowden: No, I asked him why did he tell him at that time there would be— A. (Continuing) That's what I was told, there would be an election.

Q. In other words, as I understand someone sent you— who sent you out told you there would be an election? A. Yes.

Q. *So that's what you told the people you contacted?* A. *Yes.*

Q. *Who else did you contact other than Mr. Elder?* A. *I would say about five, six others."*
(T. 122-124; R.A. 1b-2b).

He named the "five, six others" as being Richard Smith, David Hunter, Wanda Dickens, and William C. Winstead (T. 128-129; B.A. 81a-82a), and Winstead said he (Posey) solicited Bradley too (T. 335; B.A. 125a), whose cards were *counted* by the Board (and the Court) while only Elder's card was discounted on the ground that Elder, *and only he*, had been told that the "only" purpose of the card was to obtain an election. Hunter, Smith, Bradley, and Winstead were all solicited and signed a card the same day Elder signed, August 7, 1962, (T. 335-6; B.A. 125a-126a), indicating that they were probably all told the same thing that Elder was told.

Considering only the italicized portions of the testimony above, the fact that Wesley Lee Posey, a union card solicitor, admitted telling the five or six people he contacted that the

purpose of the card was *merely to show enough interest to have an election*, should be sufficient, in and of itself, to disqualify every card of every employee solicited by Posey. Here is an admission by the card solicitor himself that he told five or six people that the purpose of signing the card "was merely to show enough interest to have an election . . ." In almost every instance in which the Trial Examiner counted one of these cards toward the Union's majority status, he did so with the explanation that:

> ". . . since it does not clearly appear that he was told by Union agents that the *only* purpose of the card would be to get an election I find that there is no grounds for refusing to credit his act of signing the authorization card as a valid designation of the Union."
> (Emphasis his). (B.A. 27a; 143 N.L.R.B. at 860).

This conclusion of the Trial Examiner appears not only completely unsupported but directly contrary to the testimony and not the testimony of the employer's witnesses, *but of the card solicitors themselves.*

Incidently, no comment is made in the Board's brief to the Sixth Circuit of Appeals on the above-quoted testimony of Wesley Lee Posey. On the contrary, such comments are conspicuous by their absence. How the Board or the Union could "explain away" this clear, unequivocal admission by the card solicitor himself would be interesting, to say the least. In his Intermediate Report the Trial Examiner made a weak and unconvincing effort to do so by saying that Posey's statement to Elder that the purpose of the card "was *merely* to show enough interest to have an election" *referred only to Elder's card.*

It seems incredible that the Trial Examiner could actually hold that the magic word "only" or "solely" or "merely" must be used by the card solicitor before the card can be discounted. This theory, even if true (which it is not), is

wholly unsound, is not supported by the case law (as will be pointed out *infra*), and completely ignores the realities of the situation.

And in the instant case, the Trial Examiner's conclusion that Elder was the *only* person told this by Posey is clearly erroneous and not supported by substantial evidence when the *whole* record is considered. For example, exactly one page after making the "merely" statement quoted above, while still talking about an election, Posey was specifically asked "So that's what you told the people you contacted" and he answered "yes" (T. 123; R.A. 1b), and then, after naming the other people he contacted, stated:

"Q. Were you instructed to tell them there would be an election? A. Yes.

Q. There would be? A. Yes, there would be an election.

Q. And is that what you told these people? A. Yes.

Q. *And that included Larry Elder too?* A. *Yes.*" (T. 129; B.A. 82a).

The last four lines above clearly show that Posey related his testimony regarding Elder to the other four signers he solicited. Hunter and Winstead also signed cards the same day as Elder, August 7, 1962, and Posey admitted soliciting them too. (T. 354-5, 128-9; B.A. 118a, 81-82a). The attempt by the Trial Examiner to separate each line of the transcript and consider them out of context as he did (B.A. 22a; 143 N.L.R.B., at 858) and the extremes to which he went in his effort and zeal to count every possible and doubtful card makes a mockery of any prohibition against misrepresentation by union agents when soliciting cards. Instead of disqualifying all five of the cards solicited by Posey as he should have done, he obviously hoped that by giving up one, he could save the other four. Even he realized that he could not possibly save all five. We notice he does not go into Posey's testimony in any detail but limits his discussion of it

to one short paragraph in his lengthy report. All of this shows that the Board's case is clearly not based on substantial evidence when the *whole* record is considered. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 71 S. Ct. 456 (1950); *N.L.R.B. v. Peterson Bros., supra.*

**H. RICHARD SMITH (Winn-Dixie)**

Richard Smith confirmed Posey's admission by stating:

"Q. Well, what does the card say that you signed? A. That they would petition the Board for . . .

Q. If they got sufficient cards signed? A. Yes, sir, he said if a certain percentage of cards, if they were signed, then *there would be an election.*" (T. 254; R.A. 5b)

**I. DAVID HUNTER (Winn-Dixie)**

David Hunter, after stating (T. 306; B.A. 118a) that they told him the purpose of the card was for representation *and* to petition for an election, also confirmed Posey's admission when he testified:

"Q. Was it your understanding at the time you signed the card that there would be a petition for an election? A. *Yes, sir.*" (*Ibid.*)

**J. WILLIAM C. WINSTEAD (Winn-Dixie)**

William C. Winstead, also confirming Posey's admission, testified:

"Q. Now, did you understand at the time that you signed the card that *would* be an actual vote for the Union and that you *would* not have the opportunity to vote in a secret election later? A. I understood that if they got enough cards that there *would* be a vote if things went right.

Q. Yes, and that you *would* then have an opportunity at a later date to vote in an election your desires whether you

wanted the Union or not, is that correct? A. Yes." (T. 355).[7]

**K. JOSEPH C. HAGAN (Winn-Dixie)**

Joseph C. Hagan, in clarification of his earlier testimony that he had been informed that the purpose of the card was to have Local 227 represent him *and* to petition the Board for an election, testified, as mentioned earlier:

"Q. Mr. Hagan, at that time did you tell Mr. Sheridan and Mr. Schmidt that you had been advised by the Union representatives that there would be an election? A. Well, they asked me that if at the time I signed that I was advised that there would be an election and I was . . . ."

* * *

Q. *Was it your understanding that the card signing was just a step toward an election?* A. *Yes, sir, the same as this trial was.*" (T. 412-413; R.A. 5b)

And his card was *counted* as a valid designation of a bargaining agent (B.A. 28a; 143 N.L.R.B. at 860).

**L. MITCHELL WRIGHT, JR. (Peterson Bros.)**

Wright testified without contradiction that Groton came to his home with a card and said that he (Groton) was "getting them to sign cards and the ones that signed, would we like to have an election for the Union, and would I be interested in signing a card, and I signed a card." (T. 479; P.B.A. 118). Wright admitted that he had read the card before signing it, and that by signing the card he had "authorized the Union representative to carry this card on to do whatever he could to represent [him]" (T. 481; P.B.A. 119). Wright was asked at the hearing whether "*at the time you signed the card had you made up your mind whether you were for or against the Union?*" He answered, "*No, sir,* I haven't [hadn't] heard anything about it" (T. 479; P.B.A. 118). On cross-examination, Wright answered, "I knew he [Groton] was trying to get me to sign a card so he could hold an election." (T. 481; P.B.A. 119).

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[7] This testimony was not included in either Appendix in the Court below, having been quoted in full in Respondent's Brief.

**M. ROY LEE WRIGHT (Winn-Dixie)**

Roy Lee Wright, 16 years old, had been approached at his house three or four times about signing a union card. He refused each time, and talked to his mother about it who advised him not to sign (T. 147-8, B.A. 90a). He finally did sign because he "got sort of shook up" when told he was going to be fired unless he signed (T. 148-9, B.A. 90-91a), but he was all mixed up when he signed (T. 151, B.A. 91a) and did not know what the card meant and still didn't know at the time of the trial (T. 152, R.A. 2b). This information that he was going to be fired came from Jerry Everly (T. 148-9, B.A. 90-91a), a supervisor who had just quit (T. 108, B.A. 76a) who also persuaded James Wright and James E. Thompson to sign by using the same coercive tactics (T. 110-111 and 113-114, B.A. 77a and 79a; T. 169-170, B.A. 92-93a, and R.A. 3b) and by telling James Thompson that there would be an election (T. 170, R.A. 3b). Roy Lee Wright testified:

> "Q. Did you think the Union might keep you from getting fired if you signed that card? A. I didn't know at the present, I was sort of mixed up and everything and I really don't know, I couldn't answer exactly just like maybe you want it.
>
> Q. Well, what were you thinking of at the time you decided to sign the card? A. Well, I was all mixed up, I didn't know what I was thinking. [T. 151; B.A. 91a]
>
> * * *
>
> "Q. Did you know what the card was? A. Yes, it's a Union card.
>
> Q. It's a Union card and did you know what the signing of the card meant? A. No, I didn't know exactly." (T. 152, R.A. 2b)

**N. JAMES E. WRIGHT (Winn-Dixie)**

James E. Wright specifically stated in answer to the question, "Did you want the Union to represent you?", that,

"No, sir, I just signed because I was afraid they would fire me. That's the way I understood" (T. 111; B.A. 77a).

And both of the Wright brothers' cards were counted by the Trial Examiner, the Board, and the Sixth Circuit Court of Appeals in determining the union's majority status.

## ARGUMENT

There are many reasons why this Court should grant this petition.

One such reason is that this is a case of first impression. There are no past decisions by this Court on this point, i.e., setting forth what standards or guidelines should be used by the Courts of Appeals and the National Labor Relations Board in determining the reliability of authorization cards in cases involving the union's majority status. Just last year, the Seventh Circuit Court of Appeals said, "We know of no court decision which has set aside the finding of the Board that a Union acquired majority status by authorization cards."[8] A set of rules or standards by which the Board and the Courts of Appeals can judge authorization cards and assess their reliability or validity as designations of a union to bargain for them is urgently needed. Past decisions of the Board and Courts of Appeals are confusing, ambiguous, and irreconcilable, as in the conflict between the instant case and *Peterson Bros., supra.* As shown hereinafter, *N.I.R.B. v. Koehler, supra,* footnote 8, and *Englewood Lumber Co.,* 130 N.L.R.B. 394 (1961) are two cases presently being cited for a proposition of law for which they do not stand. This is a question of federal law which has not been, but should be, settled by this Court. Also, the Sixth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by grossly misapplying the "substantial evidence" rule in the instant case as to call for an exercise of this Court's power of supervision. And, most important of all, the decision by the Sixth Circuit Court

[8] *N.L.R.B. v. Koehler,* 328 F. 2d 770, at 772 (7th Cir. 1964).

of Appeals in the instant case is in direct conflict on four different points with the decision of the Fifth Circuit Court of Appeals in *Peterson Bros., supra,* namely, (1) on which party rests the burden of proving the validity of an authorization card as a designation of the union as bargaining agent, and how great is that burden, (2) is the "only purpose" test, *the only test* which the Board and Courts of Appeals may use to disqualify authorization cards, (3) whether the Courts of Appeals should consider the subjective intent of an employee in signing an authorization card where the evidence conclusively shows that not only is the card ambiguous but misrepresentations were made to the employees by the card solicitors in obtaining their signatures, and (4) is there substantial evidence on the record when considered as a whole to support a finding that the Petitioner (Respondent below) refused to bargain in violation of Section 8(a)(5) of the Act, when another Court of Appeals, on almost identical facts, held that there was not.

### I. Burden of Proof

There is urgent need for a pronouncement by this Court as to which party, the Company or the Board, has the burden of proving the validity and reliability of ambiguous authorization cards in cases involving misrepresentations which are in accord with the ambiguity. There is utter confusion among the lower courts as well as among the Trial Examiners of the Board.

It is immediately apparent from a study of the decisions of the Trial Examiner, the Board, and the Court of Appeals in *Peterson Bros., supra,* and the instant case, that the respective decisions of the Courts of Appeals in these two cases were, substantially, based to a large extent upon the respective findings of the Trial Examiners. Thus, the decisions of the Board and the Trial Examiners in these two cases will be discussed in addition to the decisions of the Courts of Appeals.

Let us compare the standard set forth in each of these two cases (*Peterson Bros.* and *Winn-Dixie*) for judging the validity of authorization cards and determining who has the burden of proving same. For example, in the *Peterson Bros.* case, the Trial Examiner said:

> "When employees vote for a union in a Board election their vote means that they select the union as their bargaining agent to represent them in obtaining recognition from the employer and to bargain with the employer as their representative regarding the legitimate subjects of collective bargaining. *Absent an election, it is incumbent upon the General Counsel to establish by a preponderance of the evidence, in a situation such as is here presented, that Rhodes, by signing the card, did, in effect, what he would have done by voting for the Union in a Board election as described above.*
>
> "Rhodes had refused to sign a card because of his sense of loyalty to his employer. As far as the evidence shows, no counter-reasoning or argument was presented to Rhodes to cause him to change his position except that presented by Groton. Rhodes' testimony indicates, in my opinion, that when he eventually signed a card he was probably acting on the premise presented by Groton. That premise was that signing a card had nothing to do with whether an individual was in favor of the union movement or whether he felt a sense of loyalty to the employer that moved him to reject the Union; the card signing was divorced from the issue of pro- or anti-union sentiment and was simply a means of obtaining an election. In any event, whether the foregoing was or was not the fact the situation is a[t] [sic] least ambiguous and doubt or ambiguity or even equally balanced hypotheses are not sufficient to sustain *the burden of the General Counsel* in establishing that Rhodes' signed card was the substantial equivalent of a designation of the Union as his agent or a definitive designation to obtain recognition and bargaining.
>
> "In this connection I do not regard the fact, in the circumstances presented, that, by signing a card Rhodes was not being as neutral as he would have been if he had not signed a card and that he was rendering more help to the

Union and its objectives than would have been the case if he had not signed, as altering my conclusion. The position is not neutrality or whether an employee is well disposed toward the Union or even whether he would like it to succeed. *The question is, has the employee designated the Union as his collective-bargaining agent to secure recognition from the employer and to bargain collectively with the employer on his behalf.*[20]

"Finally, the card itself, in conjunction with the testimony of Rhodes, stands for an ambiguous result or a net result that Rhodes signed the card designating the Union as his collective-bargaining agent for the limited purpose of enabling the Union to obtain an election.[21] For reasons previously stated, I do not believe that this is sufficient to establish that Rhodes had designated the Union as his bargaining representative to secure recognition from Respondent and to bargain with the Respondent regarding wages, hours, and conditions of employment.[22] [See footnotes 20, 21 and 22, at 144 N.L.R.B. at 689]

* * *

"Looking at Wright's testimony as a whole I am not persuaded that the last question and answer, in the context of his preceding answer and other testimony, is sufficient to remove the doubts or the ambiguity regarding Wright's card as evidence that he had designated the Union as his bargaining agent to secure recognition and to bargain with the Employer, rather than as evidence of an expression of willingness to help the Union secure an election. In my opinion, if the wording on the card was the same as or equivalent to the card in the *Koehler's Wholesale Restaurant Supply* case, *supra*, there would be valid ground on which to disregard Wright's testimony regarding any subjective lack of knowledge or misunderstanding as to what he knew or did not know about the card and its purposes and would leave the issue as between the wording on the card and any representations made by Groton to Wright to secure the signature. In relation to Wright's testimony and the statement made to him by Groton the card's wording is not inconsistent with the conclusion that he had selected the Union as his bargaining agent solely to secure an election. Other interpretations or extensions of the fore-

going are, of course, possible but, in my opinion, they can be no more than equally valid interpretations and such a posture is not enough on such an issue. *In substance, I believe, it is necessary that when an individual signs a card, the card and/or the circumstances must make it clear that the individual has declared himself a union adherent and has designated the Union as his agent to secure recognition and bargaining and has thereby in effect voted for the Union. I am unable . . . [on] the evidence before me to conclude that the foregoing requirement has been met and my conclusion, therefore, is that Wright's card, like Rhodes', must be rejected as evidence in support of the Union's majority.*" (144 N.L.R.B. at 691)

The Board in the *Peterson Bros.* case, *supra*, reversed the Trial Examiner stating, as to the cards in that case:

"Although the Respondent contends that it advised its employees generally that the Union was requesting signatures to the authorization cards only for the purpose of obtaining an election, we have no reason to believe that, *with the possible exception of 5 out of the 30 employees who signed these cards*, the union adherents and agents who solicited signatures induced anyone to sign by such an oral representation. This is not a case, therefore, where the Union's campaign for signatures was predicated on the representation to employees that the *only* purpose of the designations was to obtain an election [citing *Englewood Lumber Company*, 130 N.L.R.B. 394; *Morris & Associates, Inc.*, 138 N.L.R.B. 1160; cf. *Fred Snow, et al., d/b/a Snow & Sons*, 134 N.L.R.B. 709, 710; *Gorbea, Perez & Morell, S. en C.*, 133 N.L.R.B. 362, enfd. in this respect 300 F. 2d 886 (C.A. 1) and *Koehler's Wholesale Restaurant Supply*, 139 N.L.R.B. 945].

"*However, since rejection of all five cards would destroy the Union's majority status*, we must consider the nature of the representations made to these individual employees and its effect on the validity of their designations. The Trial Examiner appears to have attempted here to determine whether each of these five employees signed his card because he truly wanted the Union to represent him or because, not yet having made up his mind, he preferred to wait for a secret election. We do not, however, view that

as the material issue here. The cards on their face clearly and explicitly [?] declare their purpose. If the cards are to be voided on the ground that the employees were misled into believing the cards were to be used for a different or more limited purpose, this must be done on the basis of what the employees were told, *not on the basis of their subjective state of mind when they signed the cards.*" (144 N.L.R.B. 682)

The Fifth Circuit Court of Appeals reversed the Board in *Peterson Bros.*, saying, in agreement with the Trial Examiner:

"In view of the language on the face of the card that 'this is not an application for membership' and the language that in the alternative it is 'for an NLRB election' *we think there was a burden on the General Counsel to establish by a preponderance of the evidence that the signer of the card did, in effect, what he would have done by voting for the union in a Board election. We think that in refusing to consider the subjective intent of the signer of the card, in light of the ambiguity on the face of the card, the Board erred.* Upon a careful examination of the record we conclude that the trial examiner correctly found that the designation cards signed by Rhodes and Wright were not valid designations for the union.[2] We conclude that the Board's finding to the contrary is not based on substantial evidence on the record as a whole." (342 F. 2d at 224).

The Court further said of the card:

"It would be very simple for the union to prepare a card that in an unambiguous form would authorize union representation as a bargaining agent. If the union also wished to have cards signed to call an election this would also be a very simple matter. There can be little excuse for combining the two in a card that makes possible the misrepresentation that the Board found to have existed in the case of McElveen and the misunderstanding that the examiner found as to three other employees and which we now find as to four employees. Although the facts here are not as clear as to all of the employees involved touching on the representations made by the union organizers as in *NLRB v. Koehler's Wholesale Restaurant Supply*, 7 Cir., 328 F. 2d 770, the same principle applies. *Moreover, the*

*card here contained an ambiguity that was not present in the Koehler case.*" (342 F. 2d at 225).

The Trial Examiner and the Fifth Circuit Court of Appeals in *Peterson Bros.* felt that the burden was on the *General Counsel* to prove that the card and/or the circumstances surrounding the signing of the card "*make it clear*" that the card signer intended *at that time* to definitely cast a binding vote for the union. (If this rule were applied to the *Winn-Dixie* case, the whole case would fall because at least seven of the thirteen employees whose cards were counted were led to expect an opportunity to vote for or against the union later, in a secret election.) This is similar to the holding of the Board in the *Englewood* case, *supra*, page 14, that General Counsel has the burden of proving that the employees "*clearly* manifested an intention to designate the union as their bargaining representative" in order for their cards to be counted.

Conversely, the Trial Examiner in the instant *Winn-Dixie* case *put the burden on the Respondent to disprove* by "strong and convincing evidence" or by "a strong array of evidence" that the employee, merely by the act of signing the ambiguous card (which he says is clear), did not thereby intend to designate the union as its bargaining representative. The Trial Examiner in the instant case said:

> "To me the nature of the cards in the instant case *so clearly* [?] *indicates* a designation of authorization for representation *that strong and convincing evidence would be required to show that the cards in fact merely amounted to a request for a Board-conducted election or that they could be so represented.*" (B.A. 19a; 143 N.L.R.B. at 857)

And several lines later, the Trial Examiner again stated:

> "These cards show *so clearly* [?] an unqualified [?] designation of authorization that *it would require, to my mind, a strong array of evidence to establish that they were in fact signed by employees merely for the purpose of obtaining a Board-conducted election.*" (*Ibid.*)

Therefore, while the Trial Examiner in the *Peterson Bros.* case put the burden on *General Counsel* to show that the individual intended, by his act of signing the ambiguous card, to cast a binding and definitive vote for the union, just as if he had voted in an election, the Trial Examiner in the *Winn-Dixie* case held that, despite the ambiguity in the wording of the card and the admitted misrepresentations about an election, the card "so clearly" indicated a designation of authorization for representation that the burden then shifted *to the Respondent* to show by *strong and convincing evidence* that the cards in fact merely amounted to a request for an election.

Notice that the Trial Examiner says, *"by strong and convincing evidence."* When viewed in the light of the many misrepresentations as to the effect and purpose of the ambiguous cards, Respondent gets the feeling that it could not meet this burden of proof no matter what evidence it introduced.

The Board in the instant case, affirming the Trial Examiner's decision, said, as to the cards:

> "In the instant case the cards, on their face, specifically authorized the Union to represent the employees, And, except for one card, not in issue herein, the record shows that the representations made by the Union's solicitors in order to obtain employee signatures, clearly reflect and corroborate the purpose of the cards as printed thereon. The Trial Examiner's finding that no misrepresentations were made in securing employee signatures is amply supported by the record. Hence, without considering their subjective intent in signing the cards, we find, in agreement with the Trial Examiner, that the employees authorized the Union to represent them." (B.A. 6a; 143 N.L.R.B. at 851)

The Sixth Circuit Court of Appeals in the *Winn-Dixie* case quoted, with approval, apparently, the above statement by the Board after stating that:

> "The express language of this card could be construed to authorize the union to represent the signing employee in

bargaining with the employer, and also on his behalf to petition for an election. Although it could be argued that the wording and punctuation employed could lead to an impression that its intent was to authorize the union to act for the employee only in petitioning for an election, the Board and its examiner found otherwise. We cannot say that such finding is without support [despite the fact that James E. Thompson, Jr., specifically testified that that was exactly his understanding of the card]." (341 F. 2d at 754).

The conflict in these two decisions, solely on the issue of who has the burden of proof and how great that burden is, is clearly apparent.

### II. The "only purpose" test

In the instant case, from the Trial Examiner's decision through the Court of Appeals, General Counsel has argued that the *Englewood* and *Koehler* cases, *supra* page 14, stand for the proposition that the union authorization cards *should not be discounted* in this case because representations were not made to these employees (except Elder)[9] that the *sole* or *only* purpose of the cards was to obtain an election. Respondent submits that the correct rule of law of these two cases is that a card should be discounted if an employee is told that the only purpose of the card is to obtain an election, but Respondent further submits that these two cases do not hold that this is the only misrepresentation which will disqualify a card.

The Trial Examiner in the *Winn-Dixie* case said:

"The statement [on the card says] that the signer does 'hereby authorize District Union Local 227, AFL-CIO, to represent me and *in my behalf petition the National Labor Relations Board for an election* to determine bargaining rights.'*** These cards show so clearly an unqualified designation of authorization that it would require, to my

[9] Such representation was found only as to Elder, whose card was discounted because of it, and was not found as to employees Smith, Hunter, Dickens, or Winstead to whom, the record clearly shows, the same misrepresentation was made.

mind, a strong array of evidence to establish that they were in fact signed by employees *merely for the purpose of obtaining a Board-conducted election.* They are clearly unlike those in *Morris & Associates, Inc.*, 138 N.L.R.B. 1160." (B.A. 19a; 143 N.L.R.B. at 857).

The Trial Examiner also said:

"Respondents' brief asserts that *Englewood Lumber Company,* 130 N.L.R.B. 394, controls the instant case and requires rejection of the contention that the Union had secured a valid majority designation at the time of its bargaining demand on August 15. The General Counsel asserts that the rule of the *Englewood Lumber* case is limited to a situation where employees are solicited to sign by representations that the cards are to be used *only* for the purpose of securing an election." (143 N.L.R.B. at 857)

The Board said:

"The Respondents, on the basis of the Board's decision in *Englewood Lumber Company,* [*supra*] also contend that they were justified in refusing to recognize the Union because it did not represent a majority of their employees for collective bargaining. Specifically, the Respondents allege that the cards submitted by the Union to substantiate its majority status cannot be considered as designations of the Union to act as bargaining representative, since, as the Respondents allege, the cards were obtained for the sole purpose of enabling the Union to secure an election.[10] We do not believe that the facts herein present an issue in which the principles of *Englewood Lumber, supra,* are applicable." (143 N.L.R.B. at 851).

The Sixth Circuit Court of Appeals in the instant case stated:

"If in fact misrepresentations are made by the union to employees to the effect that the *only* purpose of the card

[10] To set the record straight, Respondent alleges only that Elder, Smith, Hunter, Dickens, Winstead and Bradley were told that the purpose of the cards was "merely" to obtain an election, that Naomi Gray was told only that the cards were to obtain an election and was not told that the cards were for representation for any purpose, and James Thompson and Joseph Hagan were told that the cards were for an election and representation, as also was Smith and Hunter.

is to authorize the union to petition the Board for an election, the card will not be construed to authorize representation, even though it contains language to that effect," (341 F, 2d at 754),

and cites *Koehler, supra,* page 14, in support of that statement.

The Sixth Circuit Court, in affirming the Board's findings against the Company, therefore, felt that the *Koehler* case was inapplicable to the state of facts present in the instant case, although the Fifth Circuit Court of Appeals felt that the *Koehler* case was applicable to the *Peterson Bros.* case, saying:

"Although the facts here are not as clear as to all of the employees involved touching on the representations made by the union organizers as in *NLRB v. Koehler's Wholesale Restaurant Supply,* 7 Cir., 328 F. 2d 770, *the same principle applies.* Moreover, the card here contained an ambiguity that was not present in the *Koehler* case." (342 F. 2d at 225).

The Board in the *Peterson Bros.* case said:

"Neither employee [Cross or Matthews] was told that the only reason for asking him to sign a card was to obtain an election." (144 N.L.R.B. at 682)

General Counsel, in its brief to the Fifth Circuit Court of Appeals in *Peterson Bros., supra,* argued that:

"The Trial Examiner, despite the plain language of the cards, wherein it was stated the cards could be used either in support of a demand for recognition, or for an NLRB election, and despite the absence of any representations by Groton that the cards would be used *solely* to obtain an election, held that the cards of Rhodes and Wright could not be used by the Union as evidence of majority representation." (General Counsel's Brief, pp. 26-27).

Respondent, in its brief to the Fifth Circuit in the *Peterson Bros.* case, stated:

"It seems incredible that the Board is seriously contending that the magic word "only" or "solely" must be used by the card solicitor before it can be concluded that the

employee-signer signed the card for the purpose of getting an election. This argument is wholely unsound and ignores the realities of the situation." (Respondent's Brief, pp. 8-9).

The *Koehler* case, *supra*, page 14, does not stand for the proposition that a card can not be discounted unless the signer was specifically told that the *only* purpose of the card was to obtain an election. In other words, the *Koehler* case is not contra to the statement that a card should not be counted if the signer was told that *a* purpose of the card is to obtain an election. The reason it is not contra is because the facts in the *Koehler* case definitely and clearly involved a situation where the signers *were* told that the *only* purpose of the card was to authorize the union to petition for an election. However, since the *Koehler* case did *not* involve statements to the signers that *a* purpose of the card was to obtain an election, the *Koehler* case did not hold that the "only purpose" remark was the *only* statement which would disqualify a card. It held that *that* statement *would* discredit or invalidate a card, but it did not hold that *no other* statement would. In other words, the holding of that case goes no further than the facts in that case, and the facts in that case involve misrepresentations to the effect that the *only* purpose of the card was to obtain an election. The Court in that case made no mention of what its ruling would have been had the word "only" been omitted from the misrepresentation, and to cite that case as authority for the statement that a card *should not be discounted unless* the signer was told that the *only* purpose of the card was to obtain an election, is error. It is authority for the statement that a card *should* be discounted *if* a signer *is* told that, but not for the converse.

### III. "Substantial Evidence" rule was misapplied

The Sixth Circuit Court of Appeals grossly misapplied the substantial evidence rule of review laid down in *Universal*

*Camera Corporation v. N.L.R.B., supra,* page 2, in concluding that there was substantial evidence on the record as a whole to support the Board's findings that employees' authorization cards could be counted as valid uncoerced designations of the union as their bargaining agent, despite such uncontradicted testimony by the employees that they did not want the union to represent them when they signed the card (James Thompson, T. 172-3; R.A. 4b), they read the card and understood that it said that the union "would represent me in a petition to the Government for an election for the Union" (James Thompson, Jr., *Ibid.*), they were told there would be an election (James Thompson, T. 171, R.A. 3b; Joseph C. Hagan, T. 412, R.A. 5b; Naomi Gray [and others], T. 136, B.A. 84a; Elder, Smith, Hunter, Dickens, and Winstead, T. 122-124 and 128-129, R.A. 1-2b and B.A. 81-82a), that the reason they signed cards was because they had been told by a supervisor who had just quit (T. 108; B.A. 76a) (and whom they believed) that they were going to be fired unless they signed cards (James Thompson, T. 169-170, B.A. 93a; Roy Lee Wright, T. 144, B.A. 89a; James Wright, T. 114, B.A. 79a), and when told that, they got all "shook up" (Roy Lee Wright, T. 148-9, B.A. 90-91a) and signed even though they were all mixed up (Roy Lee Wright, T. 151; B.A. 91a) and didn't know what the card meant they were signing (Roy Lee Wright, T. 152; R.A. 2b).

Is any decision supported by substantial evidence on the record considered as a whole when the uncontradicted testimony is directly contrary to the holding of the Court? For example, the Sixth Circuit Court, in discussing the language of the card in the instant case, stated that:

> "Although it could be argued that the wording and punctuation employed could lead to an impression that its intent was to authorize the union *to act for the employee only in petitioning for an election,* the Board and its

examiner found otherwise. We cannot say that such finding is without support." (341 F. 2d at 754).

However, James E. Thompson, Jr. testified that he read the card and "understood that the card said that they would represent me *in a petition to the Government for an election* for the Union" (T. 173; R.A. 4b). This is directly contrary to the Court's holding. Add to this Thompson's uncontradicted testimony that "*I had been told there would be an election*" (T. 171; R.A. 3b), *he* "[*didn't*] *want a Union to represent* [*him*]" (T. 171; R.A. 3b), *and he signed only out of fear when told that he was going to be fired if he didn't sign* (T. 170; R.A. 93b), and we have a complete picture of why this young man signed a union card, his understanding of what the card stated, and what was told him by the card solicitors in obtaining his signature. And in spite of all this, the Trial Examiner, the Board, and the Sixth Circuit Court of Appeals unbelievably held that this card was a valid designation of the union as his bargaining agent. How can this possibly be supported by substantial evidence on the whole record?

In support of the proposition that the Sixth Circuit Court of Appeals grossly misapplied the substantial evidence rule, consider the fact that the Fifth Circuit in *Peterson Bros.* specifically held that the counting by the Board of Hoyt Matthews' card was *not* supported by substantial evidence on the record considered as a whole, whereas the Sixth Circuit in the *Winn-Dixie* case specifically held that the counting of the card of James E. Thompson, Jr. by the Board *was* supported by substantial evidence on the record as a whole, despite the fact that both employees testified that they were told there would be an election and they understood that the signing of the card was only a step toward an election, and the cards are almost identically ambiguous. How can these two contrary holdings possibly be reconciled? There is no material difference in the facts. If anything, the "Thomp-

son" facts are stronger. It is certainly obvious that the Sixth Circuit Court of Appeals has grossly misapplied the substantial evidence rule as laid down by this Court in the *Universal Camera* case.

### IV. Subjective reactions

In cases involving ambiguous cards and misrepresentations *supporting* the ambiguity in the cards, should the Board and Courts consider the testimony of employees as to what they understood the signing of the card to mean, its purpose, and its effect, or should such "subjective reactions" be barred from consideration in assessing the reliability and validity of authorization cards? The Sixth and Fifth Circuit Courts of Appeals are in direct conflict on this point, as on the others pointed out above.

The Fifth Circuit Court of Appeals in *Peterson Bros.*, reversing the Board (who had reversed the Trial Examiner) on this point, agreed with the Trial Examiner, saying:

> "We think that in refusing to consider the subjective intent of the signer of the card, in light of the ambiguity on the face of the card, the Board erred." (342 F. 2d at 224)

The Trial Examiner in the instant case said:

> "As appears from the Board decisions in *Englewood Lumber Company, supra,* and *Gorbea, Perez & Morell, S. en C.*, 133 NLRB 362, enfd. 300 F. 2d 886 (C.A. 1), the significant factor is what, if any, misrepresentations were made as to the card, not what the signer might have understood, although conceivably his understanding might be some evidence of what he was told." (143 N.L.R.B. at 859-860, and p. 26a, Vol. I, Certified Record herein.)

The Sixth Circuit Court of Appeals in the instant *Winn-Dixie* case refused to consider subjective intent, quoting with approval the Board's findings in that case as follows:

> "Hence, *without considering their subjective intent in signing the cards,* we find, in agreement with the Trial

Examiner, that the employees authorized the Union to represent them." (341 F. 2d at 755)

The Sixth Circuit Court of Appeals in the instant case further said, quoting from the case of *Joy Silk Mills v. N.L.R.B.*, 185 F. 2d at 743, (a case which did not involve either misrepresentations or an ambiguous card):

"[A]n employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent." (341 F. 2d at 755)

However, the *Joy Silk Mills* case, *supra,* did not involve the issue of misrepresentations to the employees to confuse their understanding of the effect of signing an ambiguous authorization card, nor did the question arise of an ambiguity in the card itself. The only issue in that case was whether or not certain questions asked by the employer in a poll taken prior to the election constituted interference and whether or not those questions *were material* in the preparation of the employer's defense to the alleged violations of sections 8(a)(1) and 8(a)(5) of the Act. In that light, where there was not even any allegation of a misrepresentation or an ambiguity in the card, it is perfectly understandable that the Court would hold, and properly so, that an employee's thoughts (or afterthoughts) as to why he signed a union card and what the card meant would be immaterial.

This application by the Sixth Circuit Court of Appeals of the "no afterthoughts" rule pronounced in the *Joy Silk Mills* case to the instant case is in direct *conflict* with the concurring opinion of Judge Burger of the Circuit Court of Appeals for the District of Columbia, *the same court which rendered the Joy Silk Mills decision.* Judge Burger, in a concurring opinion in *I.U.E. v. N.L.R.B. (S.N.C. Mfg. Co.),*

__F. 2d__ (D.C. Cir. 1965), 59 LRRM 2232 at 2233 (Opinion filed May 13, 1965, not yet reported) said:

> "I agree that the record contains sufficient evidence to support the Board's conclusions that the union had a majority of the employees at the time of its demand for recognition and that the employer had no good faith reason to doubt that fact. The finding of a Section 8(a)(5) violation is accordingly sustainable.
>
> "However, a word is in order concerning the format of the authorization cards with which the union established its majority. Bold face type at the top of the form states 'Petition and Authorization to Show That I WANT AN N.L.R.B. ELECTION NOW,' the capitalized sentence being set off in a box by itself underneath the preceding words. Two paragraphs in ordinary type follow, the first paragraph authorizing the union to petition for an election and the second authorizing it to act as bargaining agent. After lines for name and address, a box at the bottom sets off the words 'Sign Here' and space for a signature.
>
> "This authorization card seems to me misleading; a less than studied reading of it might well leave the impression that it authorizes the union only to petition for an election. Moreover, this possibility of confusion is unnecessary. As Chief Judge Tuttle of the Fifth Circuit said only recently,
>
> > 'It would be very simple for the union to prepare a card that in an unambiguous form would authorize union representation as a bargaining agent. If the union also wished to have cards signed to call an election this would also be a very simple matter. There can be little excuse for combining the two in a card that makes possible*** misrepresentation***'

*NLRB v. Peterson Brothers, Inc.*, 5th Cir. No. 21412, March 11, 1965, p. 7, 58 LRRM 2570. *Our observation in Joy Silk Mills v. NLRB*, 87 U.S. App. D.C. 360, 371, 185 F. 2d 732, 743, 27 LRRM 2012, cert. denied, 341 U.S. 914, 27 LRRM 2633 (1950), *that 'an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negative the*

*overt action of having signed a card designating a union as bargaining agent' should not be taken to license the use of misleading authorization cards. If such cards are to substitute for a secret ballot, their terms ought to be unmistakeable.*" (59 LRRM 2233-4)

Even the Trial Examiner in the *Peterson Bros.* case thought the *Joy Silk Mills* "no afterthoughts" doctrine inapplicable to this type of case, saying:

"This is not a situation of an employee testifying what he thought or did not think a card meant or of having afterthoughts in the face of the clear meaning of the card. *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F. 2d 732, 734 (C.A.D.C.), cert. denied 341 U.S. 914; *N.L.R.B. v. Gorbea, Perez & Morell, S. en C.*, 300 F. 2d 886 (C.A. 1). Cf. *Koehler's Wholesale Restaurant Supply*, 139 NLRB 945, where . . . the cards in that case read '. . . : I hereby request membership in the above named Union and authorize said union . . . to act for me as a collective-bargaining agent in all matters pertaining to rates of pay, wages, hours of employment, and other conditions and terms of employment . . .' See *Morris & Associates, Inc.*, 138 NLRB 1160; *Englewood Lumber Company*, 130 NLRB 394." (FN 22, 144 N.L.R.B. at 690)

The Sixth Circuit Court of Appeals in the *Winn-Dixie* case stated that the case of *Morris & Associates, Inc.*, 138 N.L.R.B. 1160 (1962) was not controlling in the instant case because the authorization cards in the case of *Morris & Associates, Inc. supra*, emphasized the election feature rather than representation. However, while that is true, it should be noticed that the Trial Examiner in that case stated that:

"The Board is properly wary of investigating the *subjective reactions* of employees who sign authorization cards, but where the purported authorization is questionable on its face in emphasizing the election features of the designation, what the employees are told assumes greater importance regardless of individual impressions on reactions testified to after the event. I find on the basis of what

more than two-thirds of the employees who signed union card were told at the time of signature that the cards in evidence are unreliable for the purpose of establishing the Union's majority status." (138 N.L.R.B. at 1177).

The Trial Examiner cited as authority for the above-quoted statement the cases of *Englewood Lumber Company; supra,* page 14, *N.L.R.B. v. H. Rohtstein & Co., Inc.,* 266 F. 2d 407 (1st Cir. 1959); *Fred Snow, Harold Snow & Tom Snow, d/b/a Snow & Sons,* 134 N.L.R.B. 709 (1961); and *Gorbea, Perez & Morell, S. en C.,* 133 N.L.R.B. 362 (1961).

Compare this with what the Board in the *Peterson Bros.* case said, reversing its Trial Examiner (later itself reversed by the Fifth Circuit Court of Appeals):

"The Trial Examiner appears to have attempted here to determine whether each of these five employees signed his card because he truly wanted the Union to represent him or because, not yet having made up his mind, he preferred to wait for a secret election. We do not, however, view that as the material issue here. The cards on their face clearly and explicitly declare their purpose. If the cards are to be voided on the ground that the employees were mislead into believing the cards would be used for a different or more limited purpose, this must be done on the basis of what the employees were told, not on the basis of their subjective state of mind when they signed the cards. [144 N.L.R.B. at 682]

* * *

"The Trial Examiner believed that Rhodes had not meant to designate the Union as his representative, but had signed the card on the basis of the Union's premise that it had nothing to do with whether one was pro- or anti-union but was simply a means of obtaining an election, or that Rhodes' action was ambiguous and that the General Counsel had not carried his burden of proof. Chairman McCulloch and Member Fanning think this relies too heavily on Rhodes' subjective understanding as to the effect of the card." (144 N.L.R.B. at 683).

The Board in the *Peterson Bros.* case even went so far as to cite the *Englewood, Morris & Associates, Fred Snow, et al., Gorbea, Perez & Morell* and the *Koehler* cases, *supra*, pp. 14, 36, stating that those cases *did not apply* (see note 2, 144 N.L.R.B. at 682).

**SUMMARY**

It is obvious from a reading of all of the decisions in these two cases, that the two Circuit Courts of Appeals are viewing two identical cases from two entirely different views. One court considers the burden to be on General Counsel, in view of the apparent ambiguity in the card, to prove that the signing of the card was as clearly intended to be a designation of the union as a vote for the union in an election, and believes it proper to consider the subjective intent of the signer in determining this point where misrepresentations are made supporting the ambiguity in the card, and apparently does not consider it necessary that the evidence show that the employees were told that the card was *solely* to obtain an election, in order to disqualify the card.

On the other hand, the Sixth Circuit Court apparently considers the burden to be on *Respondent* to *disprove* the validity of cards, *even though ambiguous on their face* and even though misrepresentations were made strengthening this ambiguity, refuses to consider what the signers subjectively understood to be the purpose of the cards and the effect of their signing them, and apparently believes that the correct rule of law is that *a card, even an ambiguous one, need not be discounted merely because the signer was promised that there would be an election (even though there never was one), as long as he was not told that the only purpose of the card was to obtain an election.*

These two Courts are viewing identical facts under two entirely different "microscopes." They are using two very different standards and arriving at opposite results. Needless

to say, this will probably result in some criticism of the judiciary. That this will be very confusing to the members of the bar, to the Trial Examiners, the Board, and other Courts of Appeals in the future trials of other similar cases is already obvious.

For example, in the very recent trial of *N.L.R.B. v. Lake Butler Apparel,* Case No. 12-CA-2967, not reported or even decided yet, (the hearing was held on May 3-6, 1965), Counsel for Respondent, Lake Butler Apparel, continually asked the witnesses if they were told there would be an election, and many of them answered "yes." Counsel for General Counsel continually, on cross-examination, asked these same witness-signers if they were told that the *"only purpose* of signing the card was to obtain an election, emphasizing "only" or "solely," and *some* of them still answered "yes." It is already apparent that that case will probably turn on whether or not the "only purpose" rule should be applied. And as the case law now stands, the Trial Examiner is going to find himself on the horns of a very real dilemma trying to decide how to rule.

Therefore, Respondents request that this Court grant their Petition for Certiorari to review the records of the Sixth Circuit Court of Appeals in the instant case.

Respectfully submitted,

HAMILTON & BOWDEN

By: _____
(Otto R. T. Bowden)

By: _____
(David A. Bartholf)

Address of Counsel:
1056 Hendricks Avenue
Jacksonville, Florida 32207

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been served by first class air mail this 21 day of June, 1965, to:

Arnold Ordman
General Counsel
National Labor Relations Board
Washington 25, D.C.

Solicitor General
Department of Justice
Washington 25, D.C.

Otto R. T. Bowden

PROCEEDINGS IN THE

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED

DEC. 17, 1964

Before: MILLER, O'SULLIVAN and
PHILLIPS, Circuit Judges.

This cause is argued by Duane R. Batista for petitioner and by Otto Bowden for respondents and is submitted to the Court.

## ORDER

(Filed Feb. 27, 1965)

On petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the petition for enforcement of the order of the National Labor Relations Board be and the same is granted and the order is hereby enforced.

No costs awarded. Rule 23 (4)

Entered by order of the Court.

s/ Carl W. Reuss, Clerk

No. 15786

# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

WINN-DIXIE STORES, INC. and
WINN-DIXIE LOUISVILLE, INC.,

*Respondents.*

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ON PETITION for Enforcement of An Order
of the National Labor Relations Board.

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Decided February 27, 1965

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Before MILLER, O'SULLIVAN and PHILLIPS, Circuit Judges.

PHILLIPS, Circuit Judge. The National Labor Relations Board has petitioned for enforcement of its decision and order reported at 143 N.L.R.B. 848.

Respondent Winn-Dixie Stores, Inc., a Florida corporation, operates through subsidiaries or divisions some 600 retail food supermarkets in the southeastern part of the United States. The present case involves a union organizational campaign at the Winn-Dixie Store at Owensboro, Kentucky, which is one of thirty-three stores operated by respondent Winn-Dixie Louisville, Inc., a wholly-owned subsidiary corporation. Both respondents urge that enforcement of the Board's order be denied, upon various

grounds hereinafter discussed. We grant enforcement of the order of the Board.

On August 6, 1962, District Union Local 227, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, began an organizational drive among the twenty-three employees of the Owensboro store. Respondents vigorously resisted unionization. On August 15 the union forwarded to the divisional manager of Winn-Dixie Louisville photostatic copies of sixteen signed authorization cards and requested recognition and collective-bargaining conferences. Respondents refused to recognize the union. On August 24 Winn-Dixie Louisville filed a petition with the Board for an election, which the Board thereafter dismissed when the complaint was issued in the present proceedings.

The Board found, in agreement with its trial examiner, that respondents violated Section 8 (a) (1) of the act, 29 U.S.C. § 158 (a) (1), by threats of reprisal against employees because of union activity and by requesting that employees furnish copies of statements given to agents of the Board in connection with the investigation of this case. The Board also found that respondents violated Section 8 (a) (5) and (1) of the act, 29 U.S.C. § 158 (a) (5) and (1), by refusing to bargain with the union. The order of the Board requires respondents to cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining or coercing the employees regarding their rights under Section 7 of the act, and requires respondents to bargain with the union upon request and to post the usual notices.

1) Liability of Parent Corporation

Respondents contend that even if Winn-Dixie Louisville is found guilty of any of the unfair labor practices charged, the order should not be made applicable to the parent corporation. The Board found that the two respondents have

common officers, directors and operators; that the common directors and operators formulate and administer a common labor policy for both respondents; that the same directors sit as the ultimate managerial authority for both the parent and subsidiary; and that the basic labor relations policy of the subsidiary emanates from the headquarters of the parent corporation in Jacksonville, Florida. It further appears that the parent corporation provides all the working capital of the subsidiary and guarantees performance of the contracts of the subsidiary. Upon the record in this case we find that the Board did not abuse its discretion in holding that the parent corporation, respondent Winn-Dixie Stores, Inc., is liable together with its subsidiary for the unfair labor practices found with respect to the Owensboro store. *N.L.R.B.* v. *Gibraltar Industries, Inc.*, 307 F.2d 428, 431 (C.A. 4), cert. denied, 372 U.S. 911; *N.L.R.B.* v. *National Shores, Inc.*, 208 F.2d 688, 691 (C.A. 2); *Darlington Mfg. Co.* v. *N.L.R.B.*, 325 F.2d 682, 687-91 (C.A. 4) (dissenting opinion), cert. granted, 377 U.S. 903 (1964) No. 874, 1963 Term; renumbered No. 41, 1964 Term); cf. *N.L.R.B.* v. *Deena Artware, Inc.*, 361 U.S. 398, 402-04; *N.L.R.B.* v. *Elias Brothers Big Boy, Inc.*, 325 F.2d 360 (C.A. 6); *N.L.R.B.* v. *Royal Oak Tool & Machine Co.*, 320 F.2d 77, 80, 81 (C.A. 6).

It is to be emphasized that the order of the Board is expressly limited in its application to the Owensboro store, and does not apply to other supermarkets operated by respondents.

2) Interference, Restraint and Coercion

We find substantial evidence on the record supporting the Board's conclusion that respondents violated Section 8 (a) (1) by interrogation and threats of reprisal, including a threat to close the Owensboro store in event a majority of the employees authorized the union to become their bargaining representative. Reference is made to the decision

of the Board for details of these violations. 143 N.L.R.B. 848.

3) Requesting Copies of Statements

The only aspect of the Section 8 (a) (1) violations requiring discussion here is the Board's finding that respondents violated the act by requesting from employees copies of statements given to agents of the Board. We approve the following language of the Board's decision on this point:

> "Pre-trial statements taken by the General Counsel are intended to record and preserve the facts leading to the alleged unfair labor practices on which the charge is based. As such, these statements necessarily reveal the employees' attitudes, activities, and sympathies in connection with the Union. Moreover, the statements divulge the sympathies and activities of other employees and the conduct of the supervisors toward the Union and its adherents. As such, they should be as free of any inquisitive interest by the Employer as are the employees' union activities themselves. Knowledge by the employee that his Employer is manifesting an interest in what the employee may say about him can only exert an inhibitory effect on the employee's willingness to give a statement at all or to disclose all of the matters of which he has knowledge for fear of saying something that might incur the Employer's displeasure and possible reprisal. Accordingly, we are of the opinion that the Respondents' requests for copies of employees' statements to the General Counsel constitute interference, restraint, and coercion within the meaning of Section 8 (a) (1) of the Act." 143 N.L.R.B. at 849-50.

See also, *Siegel Co.* v. *N.L.R.B.*, 328 F.2d 25, 27 (C.A. 2).

It is to be emphasized that the Board recognized, as do we, that the respondents had the right to "interview employees for the purpose of discovering facts within the limits of the issues raised by a complaint, where the employer, or its counsel, does so for the purpose of preparing its case for trial and does not go beyond the necessities of such preparation to pry into matters of union membership, to discuss the nature or extent of union activity, to dissuade

employees from joining or remaining members of a union, or otherwise to interfere with the statutory right to self organization." *Joy Silk Mills* v. *N.L.R.B.*, 185 F.2d 732, 743, (C.A. D.C.), cert. denied, 341 U.S. 914.

In *Joy Silk Mills* the court also said:

> "Apparently this rule means that an employer may question his employees in preparation for a hearing but is restricted to questions relevant to the charges of unfair labor practice and of sufficient probative value to justify the risk of intimidation which interrogation as to union matters necessarily entails; and that even such questions may not be asked where there is purposeful intimidation of employees. Such a standard assumes that interrogation of employees concerning their union activities is, of itself, coercive, but that fairness to the employer requires that a limited amount of such questioning be permitted despite the possible restraint which may result." 185 F.2d at 743.

Moreover, the Board has held that while the employer may not, prior to the hearing, ask for a copy of a statement given by the employee to the Board, he may ask whether the employee has given the Board a statement. *Montgomery Ward & Co.*, 146 N.L.R.B. No. 1. Further, the employer is entitled to access to the statement when the employee testifies at the hearing, *Raser Tanning Co.* v. *N.L.R.B.*, 276 F.2d 80, 82-83 (C.A. 6), cert. denied, 363 U.S. 830, or may request copies without coercion under procedures established by the Board. *W. T. Grant Company* v. *N.L.R.B.*, 337 F.2d 447 (C.A. 7).

This court has reached the same decision on this question in its opinion announced today in *Surprenant Manufacturing Co.* v. *N.L.R.B.*, No. 15,592, . . . F.2d . . . .

4) Failure of Respondents to Bargain with Union

The most serious question presented is that part of the Board's order requiring that respondent's proceed upon request to bargain with the union, as the exclusive representative of the employees at respondents' Owensboro store,

even though no election has been conducted. The Board found that at the time the union requested recognition by respondents as bargaining representative, it had valid designation cards signed by a majority of the employees, and that respondents refused recognition, not because of a good faith doubt as to the union's majority status, but in order to gain time in which to undermine that status.

The union furnished to respondents photostatic copies of sixteen signed authorization cards. The Board rejected two of the cards as having been signed by supervisors, and a third because the employee was told that the only purpose of signing the card was to obtain an election, and not to authorize union representation. After rejecting these three cards, the Board found that the union had been designated as bargaining representative by a majority of thirteen of the twenty-three employees at the Owensboro store.

The authorization cards were regulation 3½" by 5½" business reply mail postal cards. The signature side was captioned, in letters larger and blacker than anything else on the card, as follows: "AUTHORIZATION FOR REPRESENTATION UNDER THE NATIONAL LABOR RELATIONS ACT." Under this heading there was space for a date to be filled in by the employee, and spaces for the name of the employer and the job title of the signer. Over the signature and home address of the signer was a statement that the undersigned employee does "hereby authorize District Union Local 227, AFL-CIO, to represent me and in my behalf petition the National Labor Relations Board for an election to determine bargaining rights."

The express language of this card could be construed to authorize the union to represent the signing employee in bargaining with the employer, and also on his behalf to petition for an election. Although it could be argued that the wording and punctuation employed could lead to an impression that its intent was to authorize the union to

act for the employee only in petitioning for an election, the Board and its examiner found otherwise. We cannot say that such finding is without support. This case therefore is not controlled by those decisions where the primary or sole emphasis in the language of the card is authorization for petitioning for an election.[1]

The decisions of the Board as well as the opinions of the courts place more emphasis upon the representations made to the employees at the time the cards were signed than upon the language set forth in the cards. If in fact misrepresentations are made by the union to employees to the effect that the only purpose of the card is to authorize the union to petition the Board for an election, the card will not be construed to authorize representation, even though it contains language to that effect. *N.L.R.B.* v. *Koehler,* 328 F.2d 770 (C.A. 7); *Englewood Lumber Company,* 130 N.L.R.B. 394.[2]

We turn now to the question of whether there is substantial evidence on the record considered as a whole to support the following finding of the Board:

> "In the instant case the cards, on their face, specifically authorized the Union to represent the employees. And, except for one card, not in issue herein, the record shows that the representations made by the Union's solicitors in order to obtain employee signatures, clearly reflect and corroborate the purpose of the cards as printed thereon. The Trial Examiner's finding that no misrepresentations were made in securing employee signatures is amply supported by the record. Hence, without considering their

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[1] See, e.g. *Morris & Associates, Inc.,* 138 N.L.R.B. 1160, where the card was headed "I want an N.L.R.B. Election" and in the first paragraph authorized the union to petition for an election "as soon as possible" and in a later paragraph authorized the union to act as the signer's agent with the company "in regard to wages, hours and working conditions."

[2] This rule was recognized by the Board in the present case in rejecting the card signed by employee Elder, upon the ground that the union organizer "testified that he told Elder that the purpose of the card was merely to show enough interest to have an election."

subjective intent in signing the cards, we find, in agreement with the Trial Examiner, that the employees authorized the Union to represent them." 143 N.L.R.B. at 851.

As said in *N.L.R.B.* v. *Philamon Laboratories, Inc.* 298 F.2d 176, 179 (C.A. 2), cert. denied, 370 U.S. 919:

> "'The act imposes a duty to bargain in good faith upon request whenever a labor organization has been designated by a majority of employees in an appropriate bargaining unit. The employer must recognize and bargain with such an organization whether or not it has been certified by the Labor Board. United Mine Workers of America v. Arkansas Oak Flooring Co., 251 U.S. 62, 76 S.Ct. 559, 100 L.Ed. 941 (1956); N.L.R.B. v. Sunrise Lumber & Trim Corp., 241 F.2d 620 (2 Cir., 1957), cert. denied 355 U.S. 818, 78 S.Ct. 22, 2 L.Ed. 2d 34 (1957). To be sure, an employer laboring under a good faith doubt as to a union's majority status need not extend recognition. Nevertheless, in the absence of such a doubt, the employer has no vested right to an election. N.L.R.B. v. Trimfit of California, 211 F.2d 206 (9 Cir., 1954)."

Of the fourteen employees[3] whose cards were presented by the union to respondents, twelve appeared at the hearing to identify their signatures and explain the circumstances under which they signed. The union solicitors who obtained the signatures of the other two employees testified as to the details of how these cards were signed.

As said in *Joy Silk Mills* v. *N.L.R.B.*, *supra:*

> "[A]n employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent. N.L.R.B. v. Sunshine Mining Co., 9 Cir., 110 F.2d 780, 790; N.L.R.B. v. Consolidated Machine Tool Corp., 67 N.L.R.B., 737, 739, enforced 163 F.2d 376, certiorari denied 332 U.S. 824, 68 S.Ct. 164, 92 L.Ed. 399." 185 F.2d at 743.

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[3] We disregard the two supervisors whose cards were rejected by the Board.

To like effect see *N.L.R.B.* v. *Greenfield Components Corp.*, 317 F.2d 85, 87 (C.A. 1); *N.L.R.B.* v. *Gorbea, Perez & Morell*, 300 F.2d 886 (C.A. 1).

While some of the testimony is conflicting and ambiguous, we find substantial evidence on the record considered as a whole to support the holding of the Board to the effect that thirteen employees, constituting a majority, signed valid authorization cards, that no misrepresentations were made by union representatives sufficient to invalidate the cards, that respondents did not have grounds for a good faith doubt as to the union's majority status, and that respondents violated Section 8 (a) (5) and (1) of the act in refusing to bargain with the union. *N.L.R.B.* v. *Gorbea, Perez & Morell, supra; N.L.R.B.* v. *Stow Mfg. Co.*, 217 F.2d 900 (C.A. 2), cert. denied, 348 U.S. 964.

5) Appropriate Unit

Respondents contend that the Owensboro store does not constitute an appropriate unit for collective bargaining within the meaning of the act. In holding this store to be an appropriate unit, the Board considered the factors of geographic separation from other stores in the Winn-Dixie chain, the practice of respondents of hiring local employees, minimal exchange with other stores, absence of a bargaining history on a broader basis, and the fact that there was not any union seeking to represent these employees on a broader basis.

As said by this court in *Metropolitan Life Insurance Company* v. *N.L.R.B.*, 330 F.2d 62, 65 (C.A. 6), petition for cert. filed, 33 U.S. L. Week 3059 (U.S. June 30, 1964) (No. 229):

> "The Board has the authority under the Act to determine the appropriate unit for collective bargaining. (Section 159(b), Title 29, U.S.C.) It has wide discretionary powers in this respect. What is an appropriate

unit is a question of fact to be determined by the Board upon the facts of each case. Its decision will not be disturbed except for an abuse of discretion or violation of the statute."

We hold that the Board acted within its power in fixing the Owensboro store as an appropriate unit.

Enforcement of the order of the Board is granted.

No. 15786

# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

WINN-DIXIE STORES, INC. and
WINN-DIXIE LOUISVILLE, INC.,

*Respondents.*

---

## PETITION FOR REHEARING

Comes now Respondents, Winn-Dixie Stores, Inc. and Winn-Dixie Louisville, Inc., by and through their undersigned attorneys, and moves this Honorable Court for a rehearing in the above case on the ground that the decision rendered herein on February 27, 1965, is contrary to and conflicts with the case of *N.L.R.B. v. Koehler's Wholesale Restaurant Supply* 7 Cir. 328 F. 2d 770, (see also the recent decision of *National Labor Relations Board v. Peterson Brothers, Inc.*, No. 21,412, opinion rendered March 11, 1965).

HAMILTON, BOWDEN & COFFMAN

By _____

(O. R. T. Bowden)
*Attorneys for Respondent*

Address of Counsel:
1056 Hendricks Avenue
Jacksonville, Florida

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Marcel Mallet-Prevost, Esq., Assistant General Counsel, National Labor Relations Board, Washington, D. C. 20570 and Charles R. Isenberg, Esq., 1010 Republic Building, Louisville, Kentucky by first-class mail this 17th day of March, 1965.

_____

*Attorney*

## CERTIFICATE OF GOOD FAITH

Before me the undersigned authority, personally appeared O. R. T. Bowden of Hamilton, Bowden & Coffman, attorneys for Respondents, who states that the attached Petition for Rehearing is presented in good faith and not for the purposes of delay.

HAMILTON, BOWDEN & COFFMAN

By _____
(O. R. T. Bowden)

Sworn to and subscribed before
me this 17th day of March, 1965.

_____

Notary Public
My commission expires
Jan. 7, 1966.

## ORDER

(Filed Mar. 31, 1965)

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the Court.

s/ Carl W. Reuss,
Clerk

---

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been served by first class air mail this _____ day of _____, 1965, to:

Arnold Ordman
General Counsel
National Labor Relations Board
Washington 25, D.C.

Solicitor General
Department of Justice
Washington 25, D.C.

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Otto R. T. Bowden

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# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 295

WINN-DIXIE STORES, INC. & WINN-DIXIE LOUISVILLE, INC., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-13) is reported at 341 F. 2d 750. The Board's decision and order (R. 2a-11a)[1] are reported at 143 NLRB 848.

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[1] "R." references are to the portions of the record printed as an appendix to the Board's brief in the court below.

## JURISDICTION

The judgment of the court of appeals was entered on February 27, 1965 (Pet. App. 3). A petition for rehearing was denied on March 31, 1965 (Pet. App. 16). The petition for a writ of certiorari was filed on June 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

## QUESTION PRESENTED

Whether the Board properly found that a majority of the employees provided the union with valid authorizations to represent them for collective bargaining purposes.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at pp. 3-4 of the petition.

## STATEMENT

### A. THE BOARD'S FINDINGS OF FACT

Petitioner Winn-Dixie Stores, Inc., a Florida corporation with its principal place of business in Jacksonville, operates through subsidiaries or divisions some 600 supermarkets in the southeastern United States (R. 14a; 54a-56a, 166a-167a). One of its

wholly owned subsidiaries is petitioner[2] Winn-Dixie Louisville, a Kentucky corporation which operates 33 supermarkets in the Kentucky area including one at Owensboro, Kentucky (*ibid.*).

1. On August 6, 1962, the Union[3] began an organizing campaign at the Owensboro supermarket. Three union officers, assisted by three volunteer workers employed by the Company's competitors, began to talk to the Company's employees and circulate authorization cards among them (R. 16a; 72a). That same day Assistant Store Manager William Ross notified Store Supervisor Thomas Hamilton in Louisville, by telephone, of the organizational drive in Owensboro (R. 16a; 164a). Two days later, Hamilton arrived at the Owensboro store as did Clem Schmidt, the Company's Louisville divisional manager. These two officials, and Assistant Store Manager William Ross, proceeded to interrogate various employees about their union activities (Hamilton, R. 35a; 95a-97a; Schmidt, R. 32a-33a; 97a-98a, 143a-145a; Ross, R. 43a-44a; 103a-107a). In the process, Schmidt made known the Company's hostility to the Union by such remarks as: "We are not going to have any God damn Union here at Winn-Dixie" (R. 32a; 97a-98a); if the Union got in, "they [the Company]

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[2] Petitioners are collectively referred to as "the Company." The Board found (R. 47a-48a) that there were sufficient connections between the petitioners to treat them together for purposes of the Act. The court below sustained that finding (Pet. App. 5-6), and it is not challenged here.

[3] District Union Local 227, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

would just lock the doors, . . . they had 601 stores and they didn't think they would need this one" (R. 32a-33a; 144a). Ross also solicited employee Richard Smith to report on the union activities of other employees; Smith did as he was instructed (R. 43a-44a; 103a-107a).

Meanwhile, the Union was soliciting authorization cards from the employees (see *infra*, pp. 6-7), and by August 15 had obtained 16 cards out of a bargaining unit of 23 employees (R. 28a; 168a). On that date, Union Financial Secretary Eugene Duncan wrote Divisional Manager Schmidt a letter, requesting bargaining on behalf of the employees at the Owensboro store (R. 16a; 169a-170a). To prove the Union's majority, he enclosed photostats of the 16 cards (*ibid.*). The Company did not reply immediately; instead it stepped up its campaign against the Union.

The day after receipt of the Union's bargaining request, Schmidt summoned employee George Montgomery to a back room of the store and showed him the photostat of his authorization card that had been enclosed with the Union's bargaining request. Schmidt asked what the Company had done to cause Montgomery to sign the card. Montgomery replied that the Company's past discharge policy had made him fear that he lacked job security. After discussing some of the past incidents, Schmidt stated that "the Union had tried to organized before and they had never succeeded yet" (R. 33a; 133a-134a). About the same time, Store Managers Davis and Ross had a

discussion with employee Bollinger, in the front office, respecting the Union. Davis asserted: "Louise, we won't [organize], we'll just go back home. We [management] have a job with the Company just as long as we want it. You people here, your homes are here and this is your job. You are the ones that will lose. We won't lose anything." Davis concluded by saying that the store would be closed if the Union "got in" (R. 42a; 145a).

During this period Assistant Store Manager Ross enlisted an employee to spy on his co-workers (R. 44a; 116a-117a), and District Manager Hamilton and Davis interrogated two other employees concerning their own union activities (R. 3a, 35a-36a, 41a; 109a-111a). Meanwhile Assistant Divisional Manager Marion Merritt began making frequent trips from Louisville to Owensboro, to see the card-signing employees individually. Merritt asked four employees who were called in to list their grievances against the Company, and he then gave them an explanation of the National Labor Relations Act (R. 37a-38a, 107a-109a, 126a, 128a, 138a-139a, 145a-148a). One of the four was threatened with loss of benefits should the Union organize the store (R. 37a; 145a-148a), while another was informed that the Union people were "lying sons-of-bitches" and "a bunch of crooks" (R. 38a; 126a-128a).

On August 22, the Company's attorney, O.R.T. Bowden, replied to the Union's recognition request of August 15. He asserted that the Company would refuse to bargain until the Union won a Board-con-

ducted election[4] because, *inter alia*, "The employees have indicated that many cards were signed for reasons other than personal desires" (R. 16a-17a; 170a-171a).

2. The cards which the Union organizers solicited the employees to sign had printed on them at the top in big, bold, black letters the heading:

> AUTHORIZATION FOR REPRESENTATION UNDER THE NATIONAL LABOR RELATIONS ACT.

This was followed in less prominent lettering by the statement, "I . . . hereby authorize District Union Local 227, AFL-CIO, to represent me and in my behalf petition the National Labor Relations Board for an election to determine bargaining rights." The address of the Union was on the back side. (R. 19a; 168a.)

In accord with the statements on the card, many of the employees who signed cards were told by the card solicitors that the reason for signing was to enable the Union to represent them, and to enable the Union to petition for a Board election. Thus, employee Richard Smith testified that he was told that signing the card would enable the Union "to represent [him] and petition the Board for an election" (R. 22a-23a; 104a). Employees Hunter, Winstead, and Hagan were told the same (R. 24a-28a; 117a-118a, 125a, 138a). Employee Pierce was told that the purpose of the card was "to have the Union rep-

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[4] On August 24, the Company filed a petition for an election, which was thereafter dismissed when the unfair labor practice complaint issued (R. 17a).

resent [him]" (R. 22a; 94a); employee Bradley was told that "signing the card would give [the Union] the right to bargain with Winn-Dixie for the employees to have a Union in the store" (R. 25a-26a; 121a); and employee Gray was told that signing the card would get her "into the Union," and that there would be an election (R. 23a-24a; 84a). Employee Dickens was told that there would be an election if a sufficient number of people signed cards (R. 24a; 113a). Employees James and Roy Wright were told that signing the card would protect their jobs, and they were not informed that there would be an election until some time after they had signed (R. 20a-21a; 76a-78a, 89a-90a). Employee James Thompson was told that signing the card would protect his job and those of his relatives, the Wrights; he was also told that the card was a petition for an election (R. 21a; 92a-93a).[5]

### B. THE BOARD'S DECISION AND ORDER

The Board concluded that the Company violated Section 8(a)(1) of the Act by the interrogation and the threats of reprisal against employees detailed above, and by requesting that employees furnish

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[5] There is no evidence of what representations were made by the Union organizers to employees Bollinger and Montgomery (R. 27a). The remaining three cards were not counted by the Examiner—the card of employee Larry Elder because solicitor Posey had told Elder that the only purpose of signing a card was to obtain an election (R. 22a), and the cards of Jerry Everly and James Westerfield because they were found to be supervisors (R. 18a).

copies of statements given Board agents in connection with the investigation of this case (R. 3a-4a).[6]

The Board further concluded that the Company violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with the Union (R. 4a-7a). The Board rejected the Company's contention that its refusal to recognize or bargain with the Union was motivated by a good faith doubt of the Union's majority status or of the appropriateness of the unit. For, "it cannot be said that the [Company's] refusal to bargain was well intentioned" where, as here, there is "clear evidence of unlawful measures taken by the [Company] to thwart the employees' union activities and to gain time in which to dissipate the Union's majority" (R. 4a).

The Board also rejected the Company's contention that the authorization cards submitted by the Union were insufficient to establish the union's majority because they were procured under the misrepresentation that they would only be used to obtain a Board election. The Board found that the card specifically authorized the Union to represent the employees, and that "except for one card, not in issue herein,[7] the

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[6] After the Union filed charges, Assistant Divisional Manager Merritt gathered the employees together into small groups of four to six, read the charges and attempted to refute them, and then asked the employees to provide him with copies of any statements they might make to Board representatives (R. 3a, 39a-40a; 99a-100a, 112a-113a, 136a-137a, 148a-149a).

[7] The card of Larry Elder, which was not counted by the Examiner (see note 5, *supra*).

record shows that the representations made by the Union's solicitors in order to obtain employee signatures, clearly reflect and corroborate the purpose of the cards as printed thereon." In these circumstances, the Board held that the employees' subjective intent in signing the cards was irrelevant, for it was clear that the employees had authorized the Union to represent them (*ibid.*).[8]

The Board's order requires the Company to cease and desist from the unfair labor practices found, and from in any other manner interfering with employee rights; to bargain with the Union; and to post appropriate notices (R. 7a-9a).

### C. THE DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's order in full (Pet. App. 4-13). Regarding the finding of a refusal to bargain, the only aspect of the case questioned in the petition (Pet. 2), the court concluded that the cards used "authorize[d] the union to represent the signing employee in bargaining with the employer, and also on his behalf to petition for an election," and that "substantial evidence on the record considered as a whole" supports the Board's finding that the Union organizers did not misrepresent the purpose of the cards in soliciting employees' signatures. The

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[8] The Examiner had allowed testimony as to the employees' subjective intent, and, on analyzing it, had concluded that it showed that the employees in question had signed cards either because they wanted to be represented by the Union or because they thought their job security would be enhanced thereby (R. 20a-29a).

Court agreed with the Board that in these circumstances " 'an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent' " (quoting from *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 743 (C.A. D.C.), certiorari denied, 341 U.S. 914). (Pet. App. 11-12.)

## ARGUMENT

The decision of the court of appeals is clearly correct, and there is no conflict of decisions. There is thus no occasion for further review.

1. Petitioners contend that the cards signed by the majority of the employees were improperly utilized by the Union as proof of its majority status because the employees who signed those cards did not intend them to serve as authorizations for representation, but merely as requests that an election be held to determine the Union's representative status.[*] This

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[*] The Board, so as to free itself from the necessity of conducting elections in which the petitioning union has no substantial likelihood of success, has long held that a union seeking a representation election must demonstrate that at least 30 percent of the employees involved are interested in selecting it as their representative. See National Labor Relations Board, Rules and Regulations and Statements of Procedure, Sec. 101.17-101.18, 29 C.F.R. 101.17-101.18; see also *National Labor Relations Board* v. *J. I. Case Co.*, 201 F. 2d 597, 598-600 (C.A. 9). Thus, in some instances, union agents may, though the Board found they did not do so here, indicate to employees that the authorization cards which they were being requested to sign would be utilized solely to satisfy the Board's showing

question, turning as it does on the facts of each particular case, raises only an evidentiary issue which is not appropriate for review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

Contrary to petitioners' contentions, in finding that the employees intended to authorize the Union to represent them, the Board and the court below did not introduce any novel theory on burden of proof or otherwise depart from settled principles. The Board found, and the court below agreed, that the cards themselves clearly manifested an intent to authorize the Union to act as the employees' representative, and that the remarks made by the Union's solicitors in order to obtain employee signatures were consistent with the purpose stated on the face of the card.[10]

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of interest rule, and not in support of a demand for recognition.

[10] On top of the card in prominent black letters is the legend, "AUTHORIZATION FOR REPRESENTATION UNDER THE NATIONAL LABOR RELATIONS ACT." Following this legend, the signer agrees that he does "hereby authorize District Union Local 227, AFL-CIO, to represent me and in my behalf petition the National Labor Relations Board for an election to determine bargaining rights." (*Supra*, p. 6.) In view of the prominence and repeated emphasis given to "authorization for representation," the Board could reasonably conclude, as it did, that the reference to an election was merely designed to cover the situation where the employer declined to accept the cards and insisted upon an election, and did not lead the employees to believe that the cards would only be used for that purpose. Nor did the Union solicitors indicate to the employees that the sole purpose of the cards was to arrange for an election (see *supra*, pp. 6-7).

In these circumstances, the courts have consistently held that testimony by the employees, given long after the cards were obtained, as to their subjective intent in signing, may not be used to impeach the cards themselves.[11] *National Labor Relations Board* v. *Greenfield Components Corp.*, 317 F. 2d 85, 89 (C.A. 1); *National Labor Relations Board* v. *Gorbea, Perez and Morell*, 300 F. 2d 886, 887 (C.A. 1); *National Labor Relations Board* v. *Stow Mfg. Co.*, 217 F. 2d 900, 902 (C.A. 2), certiorari denied, 348 U.S. 964; *National Labor Relations Board* v. *Geigy Co.*, 211 F. 2d 553, 556 (C.A. 9), certiorari denied, 348 U.S. 821; *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 743 (C.A. D.C.), certiorari denied, 341 U.S. 914; *National Labor Relations Board* v. *Consolidated Machine Tool Corp.*, 163 F. 2d 376, 378 (C.A. 2), certiorari denied, 332 U.S. 824; *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. 2d 780, 790 (C.A. 9), certiorari denied, 312 U.S. 678. Cf. *Allied Steel & Conveyors, Inc.* v. *Ford Motor Co.*, 277 F. 2d 907, 913 (C.A. 6) (". . . [I]n the absence of fraud or wilful deceit, one who signs a contract which he has had an opportunity to read and understand, is bound by its provisions.")

2. The decision in *National Labor Relations Board* v. *Peterson Bros.*, 342 F. 2d 221 (C.A. 5), is distinguishable on its facts. The card in *Peterson* was

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[11] Thus the Board properly declined to consider the testimony of employees Hagan (Pet. 9, 16), Smith (Pet. 15), Winstead (Pet. 15-16), and the Wrights (Pet. 17-18) concerning their understanding of the purpose of the cards.

worded differently from the one here, and the Fifth Circuit concluded that these differences were sufficient to render the card ambiguous on its face.[12] The Fifth Circuit held that the Board should have considered the subjective intent of the signer because of this ambiguity, which, on the findings of the Board and the court below, is lacking here. 342 F. 2d at 224.

Similarly distinguishable is *National Labor Relations Board* v. *Koehler*, 328 F. 2d 770 (C.A. 7). There, unlike here, it was found that the union organizers had led the employees to believe, at the time they signed the cards, that the cards would only be used to obtain an election (see 328 F. 2d at 773). This was also the situation in *Englewood Lumber Co.*, 130 NLRB 394, which the Board distinguished here (R. 5a-6a).

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[12] The card in *Peterson* stated "This is not an application for membership," and added, in the alternative, that it was for use "in support of the demand of this union for recognition from the company on your behalf, *or* for an NLRB election" (342 F. 2d at 223, emphasis supplied). The disjunctive "or" raises a question as to whether the signer is authorizing the union to seek recognition, merely to obtain a Board election, or both. (And, the Fifth Circuit found that at least four employees misunderstood the card, 342 F. 2d at 225.) The card here, on the other hand, used the conjunctive "and", which indicates that the signer intends to authorize the union both to seek recognition and, if necessary, to petition for an election.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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